

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to Set Hourly Rates for
Purposes of Calculating Intervenor
Compensation Awards, Pursuant to
Public Utilities Code Section 1801 and
Following, for Work Performed in
Calendar Year 2005.

R. _____

ORDER INSTITUTING RULEMAKING**Introduction**

Today's order commences the workshop and rulemaking process set forth in Resolution ALJ-184 (dated August 19, 2004) for developing hourly rates to be used in calculating intervenor compensation awards for work performed in calendar year 2005.

Preliminary Data Sets and Workshops

Resolution ALJ-184 (see Attachment 1 to this order) provides for "respondent" utilities to submit preliminary data sets regarding their expenses for representation before the Commission during calendar year 2003.¹ Following these submissions, a workshop will be held to discuss methodology and address any other implementation questions, so that addition of 2004 data, when

¹ For present purposes, "respondent" utilities will be each utility that, as of the date of this order, we have required to pay an award for intervenor work performed in calendar years 2001, 2002, or 2003.

available, and subsequent adoption of hourly rates for calendar year 2005 may be accomplished with minimal controversy.

The preliminary data sets shall be filed and served November 19, 2004; the workshop should follow approximately two weeks after submission of the data sets. If any respondent utility or other party wishes to propose an alternative method for collecting the necessary hourly rate data for utilities' in-house or outside counsel, the party must file and serve a complete description of its proposal on November 19, 2004. In the case of a respondent utility, the proposal may accompany the utility's preliminary data set but does not relieve the utility from submitting its preliminary data set at the same time. The Commissioner or Administrative Law Judge assigned to this Rulemaking will issue a ruling regarding the dates for these events and addressing any other procedural matters. The dates are subject to adjustment, but consistent with our intent of establishing hourly rates by April 2005. (See Section V of Resolution ALJ-184.)

Proposed Hourly Rates

Following the workshop, the assigned Commissioner or Administrative Law Judge will establish a schedule for the utilities and intervenors to make their proposals regarding 2005 hourly rates, again consistent with our intent of establishing these rates by April 2005. The assigned Commissioner or Administrative Law Judge may adjust the resolution's process or data requirements as may be suggested in light of the workshop's results.

Service by Electronic Mail (E-mail)

Parties will exchange documents, and the Commission will serve rulings and decisions, under the e-mail service protocol attached to this order.

Scoping

This Rulemaking is quasi-legislative in character. No formal hearings are anticipated. The schedule and scope of the proceeding are as set forth in the foregoing discussion and in Resolution ALJ-184.

Finding of Fact

A notice-and-comment process, as set forth in the foregoing discussion and in Resolution ALJ-184, is reasonable for setting hourly rates for purposes of calculating awards of intervenor compensation for work performed in Commission proceedings.

Conclusion of Law

Systematic consideration of the utilities' costs of representation, as contemplated by the foregoing discussion and Resolution ALJ-184, will assist the Commission in setting hourly rates in conformity with the standards of Public Utilities Code Section 1806.

O R D E R**IT IS ORDERED** that:

1. Respondent utilities are required, and intervenors and others are invited, to participate in the process described above and in Resolution ALJ-184 (Attachment 2 to this order) for setting hourly rates to be used in calculating intervenor compensation awards for work performed in calendar year 2005. For purposes of this order, "respondent utilities" are each utility that, as of the effective date of today's order, was required by the Commission to pay an award for intervenor work performed in calendar years 2001, 2002, or 2003.
2. The initial service list for this Rulemaking is Attachment 3 to this order.

3. Service of documents, including rulings and decisions issued by the Commission, is subject to the e-mail service protocol (Attachment 1 to this order).

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT 1

ATTACHMENT 1**Page 1****INTERVENOR COMPENSATION RULEMAKING
E-MAIL SERVICE PROTOCOL**

This protocol is to be used in the context of the Commission's Rules of Practice and Procedure (Rules).¹ The protocol applies only to service of documents and does not alter any rules or party responsibilities with respect to the filing of documents with the Commission's Docket Office.

Basics of E-mail Service

E-mail service may be made by sending the document to be served as an attachment to an e-mail message or by sending an e-mail Notice of Availability, as set forth below, to each person whose name is on the official service list, to the assigned administrative law judge (ALJ), and to any other person required to be served by statute, by Commission rule or order, or by the assigned commissioner or ALJ. Service by e-mail is complete when the e-mail message is transmitted, subject to re-service in cases of failure of e-mail service.

Serving documents as E-mail Attachments

When serving documents as attachments to an e-mail message, the serving party must include in the subject line of the message the docket number of the proceeding and a brief identification of the document(s) to be served, including the name of the serving party, and must include in the text of the message the electronic format of the document(s) (e.g., PDF, Excel), and the name, telephone

¹ This protocol is adapted from, but is not the same as, the proposed revisions to the Rules set out in R.04-01-005.

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number, e-mail address, and facsimile transmission number of the person to whom problems with receipt of the document to be served should be directed.

An e-mail serving attached documents may not exceed 3.5 megabytes in total size.

Serving a Notice of Availability

A Notice of Availability served by e-mail must contain in its subject line the docket number of the proceeding and the words “notice of availability,” followed by a brief identification of the document to be served. A Notice of Availability may be served:

- (1) if the document to be served, including attachments, exceeds 100 kilobytes;
- (2) if a document to be served by sending an e-mail message with the document attached has attachments that are not readily reproducible in electronic format, would be too voluminous to attach to the e-mail message, or would be likely to cause e-mail service to fail for any other reason;
- (3) if the document is served by making it available at a particular Uniform Resource Locator site (URL) on the World Wide Web. In this case, the Notice must contain a complete and accurate hyperlink to the URL at which the document to be served has been made available in a readily readable and downloadable form, and must state the date on which the document was made available at that site.

The Notice shall contain information about how to access or download the document to be served, or any other information required or allowed by the assigned commissioner or ALJ; it may not contain any attachments.

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Format of Documents

The entire document to be served must be merged into a single electronic file (*e.g.*, title page, table of contents, text, attachments, service list), unless the attachments would make the document too large to be served as an e-mail attachment. Documents to be served by e-mail or posted on the World Wide Web must be in readily readable, downloadable, printable, and searchable formats. Wherever appropriate, the assigned ALJ may require particular formats to be used.

Failure of E-mail Service

In the event of failure of e-mail service, the serving party must promptly re-serve the document by any means authorized by the Rules. E-mail service may be used to re-serve the document only if the receiving party consents to the re-use of e-mail service, or the serving party determines that the cause of the failure of e-mail service has been rectified.

Commission Documents

The Commission will serve rulings, decisions, and other documents in accordance with this protocol.

Paper Copies to the ALJ

The serving party must provide a paper copy of all documents served by e-mail service to the ALJ, unless the ALJ orders otherwise.

Modification of Protocol

The ALJ may modify this protocol as needed to ensure the efficient and fair conduct of this proceeding.

(END OF ATTACHMENT 1)

ATTACHMENT 2

ALJ/KOT/tcg

Mailed 8/25/2004

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Resolution ALJ-184
Administrative Law Judge Division
August 19, 2004

R E S O L U T I O N

RESOLUTION ALJ-184. Adopting annual process for setting hourly rates to use in calculating compensation awards to intervenors.

I. Introduction

In today's resolution, we adopt an annual process for setting and updating hourly rates for use by intervenors in seeking compensation for substantially contributing to a Commission decision, as provided in the statutory intervenor funding program. (Pub. Util. Code §§ 1801-1812. Unless otherwise stated, all citations to statute are to the Public Utilities Code.) The hourly rates that we establish through this process will govern intervenors and their representatives who have recently participated in our proceedings, and will provide guidance to other intervenors and representatives.

II. Background

In Decision (D.) 03-10-061 and D.03-10-062, we directed the Executive Director and Chief Administrative Law Judge to "develop a comprehensive process for the Commission to annually set rates for intervenor attorney, expert, and paralegal fees...." On October 29, 2003, the Executive Director and Chief Administrative Law Judge wrote to over 40 regular participants in our proceedings, including frequent intervenors and utilities from the various regulated industries. Their letter invited comments and suggestions to begin development of this annual process. Specifically, the Commission sought input on the following questions:

1. What annual process do you recommend for setting hourly rates?

2. How would the annual process you recommend meet (1) the standards of Section 1806, and (2) the goals of D.03-10-062, specifically, “promote fairness in awards, both in absolute and relative terms” and “increase administrative efficiency [so that intervenors are paid] on a more expedited basis”?
3. Consistent with Section 1806, what information should the Commission accept or require in setting hourly rates?

Aglet Consumer Alliance (Aglet), SBC Pacific Bell (SBC), Pacific Gas and Electric (PG&E), Southern California Edison (SCE), The Utility Reform Network (TURN), AT&T Communications of California, Inc., Greenlining Institute (Greenlining), and Grueneich Resource Advocates served opening comments, on November 14, 2003. Latino Issues Forum (LIF) served opening comments on November 25, 2003. SCE and Greenlining served reply comments on December 2, 2003 and PG&E, Aglet, LIF, SBC, and TURN served reply comments on December 3, 2003.

The comments raise three main issues, which we discuss and resolve below. We expect, however, to refine the process over time, based on our experience and suggestions by everyone involved.

III. Individual Rates vs. General Ranges

Commenters differ on whether the process should produce individual rates for particular advocates or ranges of rates based upon general levels of training and experience. Some commenters suggest that the number of advocates eligible to claim intervenor compensation is sufficiently small that standardized rates for general levels of training and experience are unnecessary and cannot accurately account for different levels of experience and skill. Some commenters suggest that we adopt default rates based on general levels of training and experience but allow advocates to seek higher rates if they feel their specific training, experience, and skill warrant. Others recommend adopting ranges of rates based on training and experience, allowing advocates to present evidence of where they fall within the range.

After reviewing the comments, we propose to adopt rates for individual advocates based on their specific training and experience, taking into consideration the compensation of persons with comparable training and experience. With the additional data that we intend to gather, we can adopt fair rates for these advocates for a particular calendar year.

We intend that, in general, when we adopt a rate for a particular advocate for a particular calendar year, the intervenor seeking to recover fees for that advocate’s work in that calendar year will use that rate in calculating the intervenor’s compensation request. This generalization is subject to several qualifications. We observe, first, that

historically we have augmented an advocate's rate by a "multiplier" in consideration of various specific factors on a case-by-case basis. We will continue that practice, but because a multiplier is case-specific, it does not actually change the adopted hourly rate for that advocate. Second, an intervenor may request an adjustment to an adopted hourly rate but must show good cause for doing so. For example, if a court or regulatory agency awarded the advocate a higher hourly rate for work in the same calendar year, the intervenor may ask us to use the higher rate. The burden is on the intervenor to justify the higher rate, and in the example just given, we would expect the intervenor to address, among other things, the standard used by the court or agency in setting the higher rate and the comparability of the work performed at the Commission to the work performed at the court or agency.

Finally, the adopted rate carries our expectation about the level of the advocate's performance; to the extent that the advocate performs above or below that level in a particular proceeding we would consider augmenting or reducing the hourly rate. For example, we expect that advocates with experience before the Commission have a certain level of knowledge about our Rules of Practice and Procedure and filing requirements, so a seasoned advocate who fails to follow these rules would not be performing at a level consistent with what we would expect from someone of that training and experience. Thus, in that circumstance, we may consider awarding a lower hourly rate for the advocate's work in that proceeding. Similarly, an advocate who surpasses expectations may ask us to award a higher hourly rate. For example, where an advocate served ably in the dual role of attorney and expert, eliminating the intervenor's need to employ separate individuals for each role, we may consider awarding a higher hourly rate for that advocate's work in that proceeding.

Of necessity, we can adopt specific hourly rates only for those advocates who already have experience at the Commission. We also encourage new intervenors and advocates to participate in our proceedings. The annual process will develop information that will enable prospective intervenors to project reasonable rates by referring to ranges of training and experience revealed in that process. Particularly for attorney advocates, we have found from over 20 years of setting hourly rates that the rates tend to fall within three ranges, based on length of relevant experience and roughly corresponding to the associate, partner, and senior partner levels within a law firm. We expect to continue to specify these general ranges, which should be utilized by new intervenors and advocates in developing their proposed hourly rates.

IV. Data Requirements

Section 1806 requires that the Commission "take into consideration the market rates paid to persons of comparable training and experience who offer similar services" when

awarding compensation to advocates eligible for intervenor compensation. For this consideration, we must have sufficient data about the training and experience of advocates of both intervenors and others offering similar services on behalf of utilities and this Commission. We also need information about the “comparable market rate” for those service providers that are paid by utilities and the Commission. Commenters propose various types of information be gathered during a proceeding to set hourly rates.

So that we may assess the training and experience of Commission practitioners, we propose that current or prospective intervenors that expect to make requests for compensation for work in a given calendar year submit information about the training and experience of the personnel they expect to perform work on their behalf. The information submitted must cover both attorneys and non-attorneys. Intervenors must include the past rates adopted for their advocates in their filing and a proposed rate for the upcoming year. On the same date as the intervenor filing, respondent utilities¹ must submit a list of the training and experience of in-house personnel who have worked on matters before the Commission during the prior calendar year.² The utilities must prepare a similar list for outside counsel, experts, or other service providers who have supported the utilities’ efforts before the Commission during the prior calendar year. Each of the utilities’ lists must identify the title of the individual and type of service provided, describe the individual’s training (for example, degrees and years obtained), and indicate the individual’s experience appearing or supporting work before the Commission.

We agree with commenters that we currently have insufficient information regarding the “market rate for services paid by the ... public utility, ... to persons of comparable training and experience who are offering similar services.” (§ 1806.) Therefore, we direct the utilities to provide this information for all persons identified on the above-described lists. For in-house personnel, the utilities must develop an effective hourly rate by identifying salary, benefits and other compensation, and an allocation of

¹ The “respondent utilities” will be each utility that we have required to pay an award for intervenor work performed in any of the three calendar years preceding the calendar year for which we are setting hourly rates.

² This listing must include in-house utility witnesses, attorneys, and project managers; however, the utility may limit the listing to those persons who have participated in Commission proceedings during the past three years or will participate in the upcoming calendar year.

overheads for each individual listed. For outside service providers, the utilities must identify the rates charged to the utility (and the usual billing rate, if different) for each individual listed.³

Hourly rates paid by the Commission itself to its staff and consultants are also relevant under Section 1806, which says in part that the compensation we award “may not, in any case, exceed the comparable market rate for services paid by the commission or the public utility, whichever is greater” (emphasis added). We assume that hourly rates in the private sector generally exceed those paid by the Commission, but we will test this assumption by having our Executive Director review the data provided by the utilities. Following this review, the Executive Director will report instances, with appropriate data, in which the Commission has paid rates exceeding those paid by the utilities. Absent any such instances, the report need only note that fact, without further data.

In addition, we encourage intervenors and other interested persons to submit other information, for example, market surveys or benchmarking studies. We also invite independent experts or individuals with specialized knowledge of billing information to submit relevant information at the same time as intervenors and utilities submit their data.

As a general matter, Section 1806 requires us to look first to the compensation of practitioners before this Commission in setting rates for intervenors because of the statute’s requirement to consider the costs of providers of similar services. However, we allow intervenors and others, when appropriate, to refer to rates charged or awarded for work in other forums.

V. Timing

Commenters propose different timing for the annual process. Some commenters suggest that rates be set for a base year and then adjusted annually by some type of index (for example, the Consumer Price Index) for some period of time before the base rate is re-evaluated. Some commenters suggest that rates be based on prior year data and applied retroactively to the awards for the past year. Others suggest that we adopt rates prospectively for the coming year. Others suggest that it is sufficient if rates are adopted for a given calendar year by April of that same year, as requests for

³ To the extent that this information suggests logical ranges for comparing compensation rates for persons with similar experience, we encourage the utilities to group them accordingly.

compensation for work performed during January through March are unlikely to be resolved before April.

We agree with TURN that intervenors are unlikely to request an award of compensation for work performed in a given year prior to April of that same year. Therefore, our procedure is designed to adopt rates no later than April 30 for use that calendar year.

As described above, we are requiring utilities to submit data on compensation paid to in-house and outside representatives for the prior calendar year. We will adjust the prior year rates by the Consumer Price Index to bring them to a current year basis. The rates requested by each intervenor will be compared against the adjusted utility rates and other data submitted to assess whether the intervenor requests the market rate for persons of comparable training and experience who are offering similar services.

We do not at this time adopt a base year rate with subsequent annual adjustments based on an index of general inflation; we agree with certain parties that market rates for advocates do not necessarily move in lockstep with inflation rates. We are open to considering an index that is more narrowly targeted to cost increases for the professional services that we compensate through the intervenor compensation program.

We will use the following generic schedule for the annual process beginning for 2005 calendar year rates:

January 15	Utilities submit data/Intervenors submit proposed rates and supporting information
February 5	Filings (by intervenors, utilities, or other interested persons) describing how January 15 data do or do not support proposed rates for particular advocates
March 23	Draft decision adopting rates
April 22	Commission adopts hourly rates

This timing would begin for 2005 calendar year rates.

The draft resolution contemplated doing the same process in the middle of this year to derive 2004 calendar year rates. Several considerations, including our review of comments on the draft resolution, prompt us to revise our approach to 2004.

First, there are reasonable concerns and questions about how the new process will work. To address them, we will institute the rulemaking for 2005 rates soon after our

adoption of this resolution. We build into the rulemaking time to work out implementation issues before launching the above schedule. This implementation phase will include submission of preliminary data sets for utilities' 2003 costs of representation in our proceedings. Following submission, there will be a workshop. Our intent is that this implementation process will help all the participants reach a common understanding on matters such as level of detail, format, and aggregation.

Second, we will use an alternative approach, discussed in the draft resolution, for establishing 2004 rates. Under this approach, we will adopt an escalation factor and allow intervenors to use that factor to calculate award requests for work done in 2004. In other words, where we have approved an hourly rate for an advocate for 2003, an intervenor may escalate that rate by the factor when seeking compensation for that advocate's work done in 2004. There will be a rebuttable presumption that a rate so escalated is reasonable.

The comments contain information that supports an escalation factor of 8%.⁴ In fact, 8% is at the low end of the information; however, we note that the Of Counsel surveys (which TURN and Aglet regularly rely on and which report annualized increases exceeding 10% in recent years) do not appear to reflect changes in public sector salaries. The latter, which are relevant to hourly rate determination under Section 1806, have not, at least at the State level, kept pace with private sector salaries. Consequently, under these limited circumstances, we find an 8% escalation factor is reasonable.

An intervenor may still make an individualized showing in appropriate circumstances, e.g., regarding an advocate new to our proceedings, or an advocate who (in the intervenor's opinion) had progressed to a significantly higher level of expertise since we had last set an hourly rate for that advocate. Similarly, a utility could oppose an

⁴ The most remarkable information comes from PG&E, whose comments attach copies of two opinions by federal district court judge Vaughn R. Walker (N.D. Cal.). On the one hand, Judge Walker approves hourly rates for certain attorneys in 2001-02 that are somewhat lower than some rates this Commission has approved for the corresponding timeframe. On the other hand, Judge Walker uses census data for the San Francisco metropolitan area that indicate (under his methodology) an increase in the average hourly billing rate of almost 27% from 2001 to 2002. This calculation does not necessarily tell us about hourly rate escalation in more recent years, which concern us here; further, we note that Section 1806, which governs our determination of hourly rates, does not depend on census data and differs from the statute and judicial precedents to which the federal court is subject.

increase to an advocate's hourly rate, whether the increase was predicated on the escalation factor or an individualized showing.

VI. Nature of the Annual Process

The annual process should provide greater certainty to intervenors and reduce controversy in particular award requests. We want to keep the annual process short and informal because we recognize that the cost of a slow burdensome process might outweigh the hoped-for benefits. Thus, we will use notice-and-comment procedure for receiving input from utilities, intervenors, and other participants. Analysis of the data should be straightforward, and we see no need for evidentiary hearings.

We will formalize the process, however, to the extent of issuing an order instituting rulemaking. The reports and comments produced for the annual process shall be submitted for filing in the corresponding rulemaking docket.

We anticipate some concern regarding confidentiality, particularly for personal financial data. We note that we have granted confidential treatment for the personal financial data submitted by intervenors to establish "significant financial hardship," which is one component of eligibility to claim intervenor compensation. Utilities must provide cost data, as described above, but they may aggregate the data and may omit the names of individuals, provided that the utility certifies that the data submitted comply fully with the requirements of Part IV above. Further, when submitting information claimed to be confidential, the party asserting the claim must submit a redacted (public) and an unredacted (sealed) version of the document containing the information and must state the statutory basis for asserting confidentiality under the Public Records Act. (Gov. Code § 6250 et seq.)

VII. Comments on Draft Resolution

As provided by Section 311(g)(1) and Rule 77.7(c) of the Commission's Rules of Practice and Procedure, this resolution was mailed in draft for public review and comment. We received comments from Aglet, Greenlining, PG&E, SBC, SCE, TURN (joined by Utility Consumers' Action Network), Valencia Water Company (Valencia), and Verizon California Inc. (Verizon). We received replies from AT&T, LIF, WorldCom, Inc. (MCI), SBC, SCE, and TURN (joined by Aglet).

In general, commenters expressed support for the proposed annual process. Several utility commenters assert that the cost information was excessive in detail, and that further steps should be taken to protect personal privacy and confidentiality when appropriate. In response, we have changed the draft resolution in various ways, in particular, adopting a proposal by TURN and Aglet to reduce the cost information

burden. Further, we will not try to do a full-scale proceeding for calendar year 2004 rates this year, as contemplated by the draft resolution. Instead, we authorize (with certain qualifications) the use of an escalation factor by intervenors seeking new hourly rates for calendar year 2004, and we require data filings and a workshop in preparation for the first (calendar year 2005) formal rulemaking fully implementing the annual process.

Besides those issues discussed above, only two other issues appear in the comments. First, several commenters debate our use of “multipliers,” which we mentioned in Part III of the draft resolution solely to explain that the annual process makes no change to our historic practice regarding their use. The subject is otherwise beyond the scope of this resolution. Similarly, these commenters debate whether intervenors do or do not face greater risks or delays than litigants in other forums in recovering their fees and costs. The debate is irrelevant for purposes of setting hourly rates under Section 1806.

Second, Valencia asks that “small” utilities (in essence, those with annual California revenues less than \$500 million) be excluded from the annual process. We will retain the requirement that a utility participate in the annual process if we ordered the utility to pay an award for intervenor work performed in any of the three calendar years preceding the calendar year for which we are setting hourly rates. In practice, intervenor awards involving small utilities are infrequent, but they occur often enough that, consistent with § 1806, we should have data on costs of representation incurred by those utilities.

Findings

1. To date, the hourly rates used for calculating intervenor compensation awards have been developed and updated largely on a case-by-case basis.
2. An annual process for developing and updating hourly rates may be preferable to the case-by-case approach, in that the annual process may reduce controversy, avoid redundant litigation, and improve the perceived and actual fairness of the adopted hourly rates.
3. The annual process set forth in this resolution should be implemented with the understanding that the process may be refined over time.
4. It is reasonable under the circumstances to use an 8% escalation factor, as described in Part V, to set hourly rates for work performed in calendar year 2004.

Order

1. The annual process set forth in this resolution is adopted for developing and updating hourly rates of intervenors' representatives.
2. To set hourly rates for calendar year 2005, the Commission will institute a Rulemaking utilizing the adopted annual rate process. The annual process, with such refinements as the Commission may adopt over time, will be implemented through annual rulemakings, beginning with calendar year 2005.
3. For calendar year 2004 only, the Commission will use a blend (described in Part V of the discussion) of an escalation factor and current procedures to set hourly rates.

This resolution is effective today.

I hereby certify that this resolution was adopted by the Public Utilities Commission at its regular meeting of August 19, 2004, and that the following Commissioners approved it.

/s/ STEVE LARSON

STEVE LARSON
Executive Director

MICHAEL R. PEEVEY
President

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

(END OF ATTACHMENT 2)

ATTACHMENT 3

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SERVICE LIST

***** **APPEARANCES** *****

Robert Munoz
WORLD COM
201 SPEAR STREET, 9TH FLOOR
SAN FRANCISCO CA 94105
(415) 228-1135
robert.munoz@mci.com

William P. Adams
ADAMS ELECTRICAL SAFETY CONSULTING
716 BRETT AVENUE
ROHNERT PARK CA 94928-4012
(707) 795-7549

Ronald L. Knecht
ADVOCATES FOR THE PUBLIC INTEREST
1009 SPENCER ST
CARSON CITY NV 89703-5422
(650) 968-0115
ronknecht@aol.com

James Weil
AGLET CONSUMER ALLIANCE
PO BOX 1599
FORESTHILL CA 95631
(530) 367-3300
jweil@aglet.org

Dan Geis
AGRICULTURAL ENERGY CONSUMERS ASSO.
925 L STREET, SUITE 800
SACRAMENTO CA 95814
(916) 441-6206
dgeis@dolphingroup.org

Darlene Clark
Attorney At Law
AT&T COMMUNICATIONS OF CALIFORNIA, INC.
795 FOLSOM STREET, ROOM 2169
SAN FRANCISCO CA 94107
(415) 442-2143
darleneclark@att.com

William A. Ettinger
Attorney At Law
AT&T COMMUNICATIONS OF CALIFORNIA, INC.
795 FOLSOM STREET, ROOM 625
SAN FRANCISCO CA 94107
(415) 442-2783
ettinger@att.com

Roger Kropke
BEAR VALLEY ELECTRIC SERVICE
PO BOX 1547
BIG BEAR LAKE CA 92315
kswitzer@scwater.com

Sharon De Cray
CALIFORNIA ALLIANCE OF INFORMATION SRVCS
C/O EDEN I&R
570 B STREET
HAYWARD CA 94541
(510) 537-2710
decray@edenir.org

Bill R. White
CALIFORNIA ASSOCIATION OF THE DEAF, INC.
1712 AVONDALE AVENUE
SACRAMENTO CA 95825

Glenn Semow
CALIFORNIA CABLE & TELECOMM. ASSOC.
4341 PIEDMONT AVENUE
OAKLAND CA 94611
(510) 428-2225
gsemow@calcable.org

J. Kendrick Kresse
CALIFORNIA CENTER FOR LAW AND THE DEAF
14895 EAST 14TH STREET, SUITE 220
SAN LEANDRO CA 94578
(510) 483-0922
ken.kresse@deafllaw.org

Bruce E. Stanton
Association, Inc.
CALIFORNIA MOBILEHOME RESOURCE & ACTION
1530 ALAMEDA
THE GARDEN ALAMEDA, SUITE 115
SAN JOSE CA 95126
(408) 971-0900

ATTACHMENT 3

Page 2

Julian C. Chang
AT&T COMMUNICATIONS OF CALIFORNIA, INC.
795 FOLSOM STREET, ROOM 2164
SAN FRANCISCO CA 94107
(415) 442-3449
julianchang@att.com

Francis S. Ferraro
Vice President
CALIFORNIA WATER SERVICE COMPANY
1720 N. 1ST STREET
SAN JOSE CA 95112-4598
sferraro@calwater.com

Nikayla K. Nail Thomas
Executive Director
CALTEL
515 S. FLOWER STREET, 47/F
LOS ANGELES CA 90071
(213) 213-3740
nnail@caltel.org

Karen Johanson
CAUSE
60 ROSE HILL DRIVE
BLUFFTON SC 29910
(909) 303-0459
kbjoha@aol.com

E.B. Tommy Thomas
President
CHOCTAW COMM. INC. DBA SMOKE SIGNAL COMM
8700 S. GESSNER
HOUSTON TX 77074
(713) 779-0692

Peter Frech
CITIZENS CONCERNED ABOUT EMFS
PO BOX 120
SAN RAMON CA 94583
(925) 830-4655
pfrech@opendomain.com

Charles E. Born
Manager-State Government Affairs
CITIZENS TELECOMMUNICATIONS CO. OF CA
PO BOX 340
ELK GROVE CA 95759
cborn@czn.com

Dave Hennessy
CALIFORNIA MOBILEHOME RESOURCE & ACTION
29171 DELGADO RD.
HAYWARD CA 94544

Mark Savage
Attorney At Law
CONSUMERS UNION OF U.S., INC.
1535 MISSION STREET
SAN FRANCISCO CA 94103
(415) 431-6747
savama@consumer.org

Sean P. Beatty
Attorney At Law
COOPER, WHITE & COOPER, LLP
201 CALIFORNIA ST., 17TH FLOOR
SAN FRANCISCO CA 94111
(415) 433-1900
sbeatty@cwclaw.com

Phil Ceguera
COVAD COMMUNICATIONS
3420 CENTRAL EXPRESSWAY
SANTA CLARA CA 95051
(408) 616-6609
pceguera@covad.com

Doug Garrett
COX CALIFORNIA TELCOM, LLC, DBA COX COMM
2200 POWELL STREET, SUITE 1035
EMERYVILLE CA 94608-2618
(510) 923-6220
douglas.garrett@cox.com

Betty Jo Toccoli
CSBRT/CSBA
6101 WEST CENTENALIA AVENUE, 342
CULVER CITY CA 90230
(800) 350-2722
csba@pacbell.net

David J. Marchant
Attorney At Law
DAVIS WRIGHT TREMAINE LLP
ONE EMBARCADERO CENTER, STE. 600
SAN FRANCISCO CA 94111-3834
(415) 276-6500
davidmarchant@dwt.com

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Dave Hennessy
CMRAA
3381 STEVENS CREEK BLVD.
SAN JOSE CA 95117
(408) 244-8134
cmraa@aol.com

Sara Zimmerman
DISABILITY RIGHTS ADVOCATES
449 15TH STREET, SUITE 303
OAKLAND CA 94612
(510) 451-8644
szimmerman@dralegal.org

Daniel Kirshner
ENVIRONMENTAL DEFENSE FUND
5655 COLLEGE AVENUE, SUITE 304
OAKLAND CA 94618
(510) 658-8008
dkirshner@environmentaldefense.org

Lee Burdick
Attorney At Law
FERRIS & BRITTON
401 WEST A STREET, SUITE 1600
SAN DIEGO CA 92101
(619) 233-3131
lburdick@ferrisbritton.com

Alan Ramo
GOLDEN GATE UNIVERSITY SCHOOL OF LAW
ENVIRONMENTAL LAW AND JUSTICE CLINIC
536 MISSION ST.
SAN FRANCISCO CA 94105
(415) 442-6654
aramo@ggu.edu

A Davis
Assistant Regional Manager
GOLDEN STATE MOBILEHOME OWNERS LEAGUE
22 YOSEMITE RD.
SAN RAFAEL CA 94903
(415) 472-5111

Jody London
DIAN M. GRUENEICH
GRUENEICH RESOURCE ADVOCATES
582 MARKET STREET, SUITE 1020
SAN FRANCISCO CA 94104
(415) 834-2300
jlondon@gralegal.com

Edward W. O'Neill
DAVIS, WRIGHT, TREMAINE, LLP
ONE EMBARCADERO CENTER, SUITE 600
SAN FRANCISCO CA 94111-3834
(415) 276-6500
edwardoneill@dwt.com

Phil Richardson
KOTTINGER RANCH HOMEOWNERS ASSOCIATION
1122 HEARST
PLEASANTON CA 94566
(925) 485-1222

Susan E. Brown
Attorney At Law
LATINO ISSUES FORUM
785 MARKET STREET, NO. 300
SAN FRANCISCO CA 94103
(415) 284-7224
lifcentral@lif.org

Kim Logue
Regulatory Analyst
LCI INTERNATIONAL TELECOM CORP.
4250 N. FAIRFAX DRIVE, 12W002
ARLINGTON VA 22203
(703) 363-4321
kim.logue@qwest.net

Thomas R. Dill
President
LODI GAS STORAGE, LLC
23265 N. STATE RT. 99 W. FRONTAGE RD
ACAMPO CA 95220
(209) 368-9277
trdill@westernhubs.com

Louie De Carlo
Compliance Manager
MCI METRO ACCESS TRANSMISSION SERVICES
201 SPEAR STREET, 9TH FLOOR
SAN FRANCISCO CA 94105

Richard Severy
MCI TELECOMMUNICATIONS CORPORATION
9TH FLOOR
201 SPEAR STREET
SAN FRANCISCO CA 94105
richard.b.severy@mci.com

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Ed Patriquin
KOTTINGER RANCH HOMEOWNERS ASSOCIATION
3718 SMALLWOOD COURT
PLEASANTON CA 94566
(925) 426-7878
patriquin@home.com

Peter Miller
NATURAL RESOURCES DEFENSE COUNCIL
1834 DELAWARE STREET
BERKELEY CA 94703
(415) 777-0220
pmiller@nrdc.org

Marilyn Salmon
PACIFIC BELL INTERNET SERVICE
485 S. MONROE STREET
SAN JOSE CA 95128

Ed Kolto
Attorney At Law
PACIFIC BELL TELEPHONE COMPANY
140 NEW MONTGOMERY STREET, ROOM 1617
SAN FRANCISCO CA 94105
(415) 545-9422
ed.kolto@sbc.com

Deborah Shefler
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B30A
SAN FRANCISCO CA 94105
(415) 973-2959
dss8@pge.com

Cynthia Schultz
PACIFICORP
900 S.W. FIFTH AVENUE, SUITE 2300
PORTLAND OR 97204
(503) 294-9246
cynthia.schultz@pacificorp.com

Leigh K. Jordan
PARK WATER COMPANY/APPLE VALLEY RANCHOS
9750 WASHBURN ROAD
PO BOX 7002
DOWNEY CA 90241-7002
(562) 923-0711
leigh@parkwater.com

Sara Steck Myers
Attorney At Law
122 - 28TH AVENUE
SAN FRANCISCO CA 94121
(415) 387-1904
ssmyers@att.net

Kathryn Ford
QWEST COMMUNICATIONS INTERNATIONAL, INC.
QWEST POLICY & LAW
1801 CALIFORNIA STREET, SUITE 4900
DENVER CO 80202
(303) 672-2776

James S. Adams
REDWOOD ALLIANCE
PO BOX 293
ARCATA CA 95521
(707) 822-7884

Greg R. Gierczak
Executive Director-Regulatory
ROSEVILLE TELEPHONE COMPANY
PO BOX 969
ROSEVILLE CA 95678
g.gierczak@surewest.com

Joseph Kloberdanz
SAN DIEGO GAS & ELECTRIC COMPANY
8330 CENTURY PARK COURT
SAN DIEGO CA 92123
(858) 654-1771
jkloberdanz@semprautilities.com

Irene K. Moosen
Attorney At Law
SAN FRANCISCO COMMUNITY POWER COOP.
53 SANTA YNEZ AVENUE
SAN FRANCISCO CA 94112
(415) 587-7343
irene@igc.org

Palle Jensen
Director Of Regulatory Affairs
SAN JOSE WATER COMPANY
374 WEST SANTA CLARA ST.
SAN JOSE CA 95196
(408) 279-7970
palle_jensen@sjwater.com

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Shawna Parks
Attorney At Law
449 - 15TH STREET, SUITE 303
OAKLAND CA 94612
(510) 451-8644
sparks@dralegal.org

PUBLIC ADVOCATES, INC.
1535 MISSION STREET
SAN FRANCISCO CA 94103-2500
(415) 431-7430
savama@consumer.org

Ed Kolto
SBC CALIFORNIA
140 NEW MONTGOMERY ST., RM 1617
SAN FRANCISCO CA 94105
(415) 545-9422
ed.kolto@sbc.com

Linda S Vandeloop
Regulatory Director
SBC PACIFIC BELL
140 NEW MONTGOMERY ST., SUITE 1718
SAN FRANCISCO CA 94105-2228
(415) 542-7556
LV8571@sbc.com

Vicki L. Thompson
Attorney At Law
SEMPRA ENERGY
101 ASH STREET HQ13
SAN DIEGO CA 92101
(619) 699-5130
vthompson@sempra.com

Marc Mihaly
Attorney At Law
SHUTE MIHALY & WEINBERGER LLP
396 HAYES STREET
SAN FRANCISCO CA 94102
(415) 552-7272
armi@smwlaw.com

Carl Zichella
Regional Staff Director
SIERRA CLUB CALIFORNIA
1414 K STREET, SUITE 500
SACRAMENTO CA 95814
(916) 557-1100 (104)

George M. Sawaya
2860 SHADY LANE
POLLOCK PINES CA 95726
(530) 644-5167

Keith Epstein
SBC ADVANCED SOLUTIONS, INC.
1010 N. ST. MARYS ST., 14TH FL
SAN ANTONIO TX 78215
(210) 246-8629
kel671@txmail.sbc.com

David R. Garcia
Attorney At Law
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD CA 91770-7740
(626) 302-2336
david.garcia@sce.com

David B. Follett
Attorney At Law
SOUTHERN CALIFORNIA GAS COMPANY
633 WEST 5TH ST., SUITE 5200
LOS ANGELES CA 90071-2071
(213) 895-5134
dfollett@sempra.com

Andrew W. Bettwy
Attorney At Law
SOUTHWEST GAS CORPORATION
5241 SPRING MOUNTAIN ROAD
LAS VEGAS NV 89102
(702) 876-7107
andy.bettwy@swgas.com

Stephen M. Kukta
SPRINT CORP.
1850 GATEWAY DRIVE
SAN MATEO CA 94404
(650) 513-2714
stephen.h.kukta@mail.sprint.com

Keith Mccrea
Attorney At Law
SUTHERLAND, ASBILL & BRENNAN
1275 PENNSYLVANIA AVENUE, NW
WASHINGTON DC 20004-2415
(202) 383-0705
keith.mccrea@sablaw.com

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Mary O. Simmons
Vice President
SIERRA PACIFIC POWER COMPANY
RATES & REGULATORY AFFAIRS
6100 NEIL ROAD, P.O. BOX 10100
RENO NV 89520
(775) 834-5870
msimmons@sierrapacific.com

Andrew Ulmer
Attorney At Law
SIMPSON PARTNERS LLP
900 FRONT STREET, SUITE 300
SAN FRANCISCO CA 94111
(415) 773-1790
andrew@simpsonpartners.com

Robert Finkelstein
Attorney At Law
THE UTILITY REFORM NETWORK
711 VAN NESS AVE., SUITE 350
SAN FRANCISCO CA 94102
(415) 929-8876 X310
bfinkelstein@turn.org

Julia Levin
UNION OF CONCERNED SCIENTISTS
2397 SHATTUCK AVENUE, SUITE 203
BERKELEY CA 94704
(510) 843-1872
jlevin@ucsusa.org

Michael Shames
Attorney At Law
UTILITY CONSUMERS' ACTION NETWORK
3100 FIFTH AVENUE, SUITE B
SAN DIEGO CA 92103
(619) 696-6966
mshames@ucan.org

Connie D. Easterly
UTILITY DESIGN, INC.
5528 PACHECO BLVD.
PACHECO CA 94553-5126
(925) 952-9324
easterly@udi-tetrad.com

Itzel Berrio
Deputy General Counsel
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, SECOND FLOOR
BERKELEY CA 94704
(510) 926-4000
iberrio@greenlining.org

Gillian Taylor
THE SIERRA CLUB
52 LA RANCHERIA
CARMEL VALLEY CA 93924
gtaylor@redshift.com

Elaine Duncan
Attorney At Law
VERIZON CALIFORNIA INC.
711 VAN NESS AVENUE, SUITE 300
SAN FRANCISCO CA 94102
(415) 474-0468
elaine.duncan@verizon.com

Donald R. Ward
PO BOX 2173
ORCUTT CA 93457
(805) 937-4860

Tom Dukich
Manager, Rates & Tariffs
WASHINGTON WATER POWER COMPANY
PO BOX 3727
SPOKANE WA 99220
(509) 489-0500

Raymond J. Czahar
Chief Financial Officer
WEST COAST GAS CO., INC.
9203 BEATTY DR.
SACRAMENTO CA 95826-9702
(916) 364-4100
westgas@aol.com

Mark Roberge
WILD GOOSE STORAGE INC.
450 SANSOME STREET, STE 1400
SAN FRANCISCO CA 94111

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Roger L. Poynts
UTILITY DESIGN, INC.
5520 PACHECO BLVD.
PACHECO CA 94553-5126
(925) 674-0218
poynts@udi-tetrad.com

Robert J. Diprimio
President
VALENCIA WATER COMPANY
24631 AVENUE ROCKEFELLER
VALENCIA CA 91355
(661) 295-6501
rdiprimio@valencia.com

Thomas A. Kiernan
VERIZON ADVANCED DATA, INC.
1166 6TH AVENUE, ROOM 22022
NEW YORK NY 10036
(212) 278-8416
tkiernan@banetworkdata.com

Barbara George
Executive Director
WOMEN'S ENERGY MATTERS
PO BOX 162008
SACRAMENTO CA 95816
(916) 739-1898
bgwem@igc.org

Karen M. Potkul
Vice President-Legal & Regulatory Affair
XO CALIFORNIA INC.
1776 W MARCH LN STE 200
STOCKTON CA 95207-6425
(949) 417-7766
karen.potkul@xo.com

***** **STATE EMPLOYEE** *****

Michelle Cooke
Administrative Law Judge Division
RM. 5006
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2637
mlc@cpuc.ca.gov

Steven Kotz
Administrative Law Judge Division
RM. 5112
505 VAN NESS AVE
San Francisco CA 94102
(415) 703-2437
kot@cpuc.ca.gov

***** **INFORMATION ONLY** *****

(END OF ATTACHMENT 3)